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Supreme Court of the United States

OCTOBER TERM, 1946

No. 255

SOL COHEN, et al.,

Petitioners,

against

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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JONATHAN B. BINGHAM,
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Supreme Court of the United States

OCTOBER TERM, 1946

No.

SOL COHEN, et al.,

Petitioners,

against

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE SUPREME COURT OF THE UNITED STATES:

The undersigned petitioners respectfully allege:

Summary Statement of Matter Involved

This is an action to recover overtime pay under the Fair Labor Standards Act. Plaintiffs, petitioners here, were employed as timekeepers and cost clerks in the construction of a wartime "staging area" known as Camp Shanks at Orangeburg, New York (just north of the New Jersey border and just west of the Hudson River) (R. 48-54, 67-71, 86-7). It is admitted that during 1942 and 1943 plaintiffs worked substantial numbers of overtime hours, for which they were paid straight time rather than time and a half. The amount of such overtime work performed by each plaintiff was stipulated (Plffs.' Ex. 5, R. 97, 124).

The only issue is whether they were entitled to the protection of the Act.

The project on which plaintiffs and defendants were engaged was a vast one, costing well over $20,000,000, and involved many different types of activity, including: the construction of barracks and accessory accommodations for large numbers of troops being processed for shipment overseas; the rehabilitation of a dock on the Hudson River; the improvement and extension of the existing interstate rail and highway connections, and of the interstate electrical transmission network in the area; the maintenance and repair of existing interstate roads; the unloading of great quantities of materials from outside the State; the loading of other materials for shipment outside the State, and the various operations of a large office staff involving constant interstate communications (R. 55-61, 75-6, 80-8, 102-6, 114-15, 120-2). Some of these activities were clearly interstate in character, others were intrastate, but organizationally defendants drew no distinction between them, at least in so far as plaintiffs' work was concerned.

In general, plaintiffs' duties were to check defendants' other employees in and out of the area, to make "field checks", and to tabulate the results. This work was "to a very large degree" centralized, and was not broken down according to types of employees checked, or according to types of operations (R. 48-55, 62-71, 86-7). In short, plaintiffs' activities related to defendants' operations as a whole, and were indispensable to all of those operations.

On these facts plaintiffs contend that they are entitled to recover. The courts of New York have taken a contrary view, insisting that plaintiffs were not entitled to the protection of the Act because they did not attempt "to identify any particular individuals with such [interstate] work or to indicate any percentage or proportion of time which they individually or collectively devoted to such work."

The plaintiffs also contend that they were "engaged in the production of goods for commerce" within the meaning of the Act and hence are entitled to protection under that phase of the statute's coverage. This contention was likewise rejected by the New York courts.

Statement on Jurisdiction

This action is brought under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., §201, the pertinent provisions of which are set forth in Appendix A. The plaintiffs' right of action being based entirely upon this Federal statute, the jurisdiction of this Court is invoked under §237(b) of the Judicial Code of the United States (28 U. S. C., §344(b)).

The action was commenced in the Supreme Court of the State of New York and judgment was rendered for the defendants on August 3, 1945 (R. 37-41). The opinion of Mr. Justice Cohalan is reported in 185 Misc. 389 and appears at R. 129-30. That decision was affirmed in the Appellate Division of the Supreme Court of the State of New York in an opinion which is reported in 270 App. Div. 478 and appears at R. 145-6, and judgment was entered on July 17, 1946.

An appeal from that judgment was taken to the Court of Appeals, the highest court of the State of New York, by permission of that Court, and on January 9, 1947, the judgment was affirmed without opinion (296 N. Y. 776). A remittitur was issued the following day, and the order and judgment on remittitur were duly entered in the Supreme Court of the State of New York on January 20 and 27, 1947, respectively. A motion for reargument was made in the Court of Appeals, and said motion was denied on May 22, 1947. This petition for certiorari is filed within less than three months of that date.

Questions Presented

1. The principal question in this case is whether the plaintiff employees were "engaged in commerce" within the meaning of the Fair Labor Standards Act during the time of their employment by the defendants. The answer to that question depends upon the degree of particularity of proof to be required of each of plaintiff employees in cases of this general character.

2. A second question, which need be considered only if the first question is answered in the negative, is whether the plaintiff employees were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Reasons for the Issuance of the Writ

1. The case at bar involves an important Federal question which has not been, but should be, determined by the Supreme Court of the United States.

2. The decision of the Court of Appeals of the State of New York, as originally handed down and as reaffirmed upon the motion for reargument, is in direct conflict with decisions in the Second and Fourth Circuits, and is not in accord with the applicable decisions of this Court, such as: *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *J. F. Fitzgerald Construction Co.* v. *Pederson*, 318 U. S. 740, 324 U. S. 720; *Mabee* v. *White Plains Publishing Company*, 237 U. S. 178, and *Anderson* v. *Mt. Clemens Pottery Co.*, 90 L. Ed. 1114.

The importance of the basic issue presented here in the application of the Fair Labor Standards Act is explained in the brief submitted herewith. Broadly stated, the sit-

uation is as follows: the New York Courts have here set up a procedural obstacle which will effectively deny the protection of the Fair Labor Standards Act to large blocks of employees who are entitled to that protection. It is respectfully submitted that this Court should decide whether or not that obstacle is to stand.

Prayer for Writ

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of this Court to the ~~Supreme~~ Court of Appeals of the State of New York, directing that Court to certify and send to this Court a transcript of all the proceedings of such Court in this case, to the end that this cause may be reviewed and determined by this Court; that the order and judgment of the ~~Supreme Court of the State of New York on remittitur from the~~ Court of Appeals of the State of New York be reversed; and that your petitioners be granted such other and further relief as may be proper.

Sol Cohen, Abe Kravit, Harry Lampert, Charles Bowlby, Harry Ambrose, Joseph A. Anzano, Abraham Attas, Irving Bachtinger, Richard Bassi, Sidney Jerry Baumfeld, Thomas J. Blessing, Wallace Bliven, Anthony Borelli, Noah A. Bower, Richard A. Bradley, Rudolph Braun, Arthur P. Brown, John F. Brown, Robert M. Caggiano, Michael Carchietta, Emile J. Cella, Abraham Cohen, Sol Coleman, Jack Cronthal, Gidion Dakin, Arthur F. Daschner, Pasquale De Laurentis, James A. De Lisio, Nicholas De Rose, George Duke, Ernest Faisant, Alexander Ferris, Benjamin Feurstein, Alfred Fickera, Eli Fishbein, Max Fishkin, Norbert Fried, Robert Gallo, Israel Gargle, Ira M. George, James Gleason, Bernard Gold, David Goldfarb, Bernard Gottlieb, Henry H. Gray, Howard Griffith, Daniel Halpern, Benjamin Herman, Abe Hohauser, James M. Holli-

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By Henry Cohen,
Their Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The required statements with respect to the opinions of the courts below, the jurisdiction of this Court, and the applicable statute are made in the accompanying petition (pp. 3-5, supra). A summary statement of the case is given in the petition at pages 1-3, supra. Additional pertinent facts are stated in the course of the argument which follows:

POINT I

Plaintiffs here were "engaged in commerce" within the meaning of the Fair Labor Standards Act.

The ruling of the courts of New York State with respect to the burden of proof imposes an impossible burden upon plaintiff employees in actions of this character and tends to defeat the purposes of the Act.

The crucial question in this case is one which is of utmost importance in the application of the Fair Labor Standards Act, but which has not yet been decided by this Court. Stripped to its essentials, the question is: where an employer whose operations are both interstate and intrastate in character does not in any way segregate the two or distinguish between them, and where some of his employees regularly perform work which is essential to both types of operations, must each employee prove what proportion of his time was allocable to the interstate phase? To answer that question in the affirmative, as the courts of New York State have done, is in effect to deprive many workers who are indisputably "engaged in commerce" of the protection of the Fair Labor Standards Act.

In order to make clear to this Court how impossible it would be for the plaintiffs here to meet the burden of proof sought to be imposed on them it is necessary to review some of the facts of the case in more detail.

An enormous quantity of materials was admittedly shipped to the project site from outside the State of New York, and was there unloaded by laborers employed by the defendants (R. 80, 115, 121). Other materials were loaded by defendants' employees for shipment out of the State (R. 122). An important part of the defendants' undertaking was the maintenance and repair of the local roads which were part of the interstate highway system, including a road connecting the camp with a dock on the Hudson River at Piermont (R. 56-61, 75-6, 84-5, 104-6). Another phase of the project, which was specifically provided for in defendants' contract, was the "rehabilitation" of that dock, an interstate facility (R. 112, 55-6, 84, 122). In addition, defendants' office staff was regularly engaged in interstate communication by mail, telegraph and telephone (R. 82-3, 120-1). By virtue of these activities—which were either admitted or established by uncontradicted testimony—the defendants were beyond any question "engaged in commerce". *Atlantic Coast Line* v. *Standard Oil,* 275 U. S. 257; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125; *J. F. Fitzgerald Construction Co.* v. *Pederson,* 318 U. S. 740, 324 U. S. 720.

Finally, defendants were extensively engaged in the improvement and extension of existing interstate facilities. A railroad spur was built by the defendants connecting the project with the Erie Railroad (R. 85-6, 87-8); new roads were constructed to connect with the existing interstate highways (R. 55, 75, 106, 122); and an electrical transmission and distribution system was put in by the defendants connecting up with interstate power lines (R. 55, 84, 102-3, 114, 121). Although recognizing that this Court has not yet had occasion to decide that employees engaged in just such activities were "engaged in com-

merce", it is submitted that the rule laid down in *J. F. Fitzgerald Construction Co.* v. *Pederson*, supra, is applicable. The Circuit Court of Appeals for the Third Circuit so held in the case of *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932, cert. denied 91 L. Ed. 140. This decision received favorable comment in 60 Harv. L. Rev. 154.

In any event, whether or not extending interstate facilities is "engaging in commerce", it is indisputable that defendants' employees—laborers, office help, etc.—were in at least four respects extensively "engaged in commerce". Now the record shows that plaintiffs checked the time of all of defendants' employees indiscriminately, including laborers, mechanics, office help, and many other categories of workers. There was no breakdown for timekeeping purposes into categories of employees, much less into categories of activity. The plaintiffs' work was "to a very large degree" centralized, and in their work they made no distinction between employees who were engaged in interstate operations and those who were engaged in purely intrastate activities. The inference is thus inescapable that the work of all the plaintiffs contributed directly to defendants' interstate and intrastate activities alike * (R. 54-5, 66, 62-3, 68, 70).

The Appellate Division of New York State nevertheless found that the plaintiffs had failed to meet "the burden which was theirs of proving that their work was interstate commerce," because:

> "They did not attempt * * * to identify any particular individuals with such [interstate] work or to indicate any percentage or proportion of time which they individually or collectively devoted to such [interstate] work" (R. 145-6).

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* It would seem to require no argument that the administrative work of timekeeping and cost-checking was so closely related to the interstate activities checked as to be "in legal contemplation a part thereof". *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932, cert. den. 91 L. Ed. 140; cf. *McLeod* v. *Threlkeld*, 319 U. S. 491. Defendants have never seriously contested this point.

The New York Court of Appeals affirmed without opinion.

It requires only a moment's reflection to see that the New York courts have here laid down a rule which frustrates the purposes of the Act, and which will disentitle large groups of employees in interstate commerce from the benefits of the Act. By its terms, for example, the rule would prevent redcaps in a railroad terminal from recovering under the Act, because they could not say whether or how much of their time they spent in carrying interstate bags.

In the present case, likewise, there was no way for the timekeepers to tell which of the employees they checked in and out at the time shacks were working on the interstate phases of the operation. It is true that the timekeepers also made daily "field-checks" out on the project, but even there it would have been impossible to determine the interstate or intrastate character of the work going on. For example, a laborer engaged in unloading trucks might be unloading materials from inside the State or from outside—there would be no way to tell.

Conceivably the defendant contractors might have kept records which would show just what the employees whose time was checked by a given timekeeper were working on during a given week. They produced no such records, and in practical fact it is improbable that they kept any. Nevertheless, it would seem that it was up to the defendants to introduce proof which might show that, as to certain individual plaintiffs, the inference raised by the plaintiffs' general showing was incorrect. In other words, although the plaintiffs may have had the burden of proof initially, when they proved that they were engaged indiscriminately in interstate and intrastate activities, they put the burden of going forward upon the defendants. The defendants chose to put in no proof and rested at the close of the plaintiffs' case.

The reasoning of this Court in the case of *Anderson* v. *Mt. Clemens Pottery Company*, 90 L. Ed. 1114, with respect to the manner of meeting a somewhat similar burden of

proof is wholly applicable. As in that case, it can here be said that employees should not be penalized for their employer's failure to keep records. However, the issue here is more than a matter of whether plaintiffs or defendants should have kept records sufficient to show whether a given timekeeper was employed at any given time in checking interstate or intrastate activities. It may be conceded that, given the organizational set-up of the defendants, it would have been almost as impossible for them to keep such records as for the plaintiffs to do so. The point—which is one of general application far beyond the limits of this case—is that, *if employers engaged in interstate as well as intrastate activities, do not choose to organize their operations so as to draw a distinction between the two types of activity, they cannot expect to avoid the effect of the Act as to those employees whose work extends into both fields.*

This point has been fully recognized by two Circuit Courts of Appeal. *Guess* v. *Montague,* 140 F. (2d) 500 (4th Circ., 1943); *Skidmore* v. *Casale,* 160 F. (2d) 527 (2nd Circ., March 6, 1947). Judge Parker's excellent opinion in the *Guess* case includes the following significant passage:

> "It is a fair inference from the evidence that plaintiffs here worked on interstate as well as intrastate business; that the two classes of business were commingled in defendant's operations; and that defendant did not attempt to distinguish between the two in the payment of wages. Under such circumstances, we think that plaintiffs have made a prima facie showing entitling them to the protection of the act" (p. 504).

In the *Skidmore* case, which was decided after the original decision of the Court of Appeals in the present case, plaintiff employees assigned to the repair and maintenance of trucks rented out by the defendant were held to be "engaged in commerce". Some of the trucks were used by defendant's customers to carry goods in interstate commerce, but there was no finding as to the percentage of such use. Further, the Court noted:

"No evidence was introduced to show any division of labor as between trucks used in interstate commerce and on those not so used. *Nor was there any analysis made of the amount of time that each man spent on trucks used in interstate shipments.*" (Italics supplied.)

The conflict between the *Skidmore* case and the decision of the Court of Appeals in the instant case is direct. If not resolved by this Court, it will result in intolerable confusion in the application of the Act in New York State and will lead to an unseemly anxiety on the part of defendant employers to avoid the Federal forum.

POINT II

Plaintiffs here were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Under either of two distinct theories the entire project at Camp Shanks constituted the "production of goods for commerce" within the meaning of the Act. If this is so, plaintiffs as timekeepers and cost clerks on the project were obviously covered by the Act and no burden of proof problem arises. *Borden Co.* v. *Borella,* 325 U. S. 679; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Roland Electrical Co.* v. *Walling,* 90 L. Ed. 326.

Under the first theory the project may be said to have involved the "production of goods for commerce" because (1) the processing of troops for overseas shipment was such production and (2) the construction of the camp was "necessary" to that production. This follows logically from the very broad definitions of terms contained in the Act. Combining those definitions, the "production of goods for commerce" includes "any process or occupation necessary to" the "handling" of "subjects of commerce". It is clear that persons may be "subjects of commerce". *Cami-*

netti v. *United States,* 242 U. S. 470, 479. It is also clear that the construction of the camp was prerequisite to the processing of the troops. The fact that the work of construction may have stopped before the processing began is immaterial. *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U. S. 88. It is true that the lower Federal courts have in a number of cases decided that the construction of productive facilities is not covered by the Act,* but we contend that these cases are inconsistent with the holding of this Court in the *Warren-Bradshaw* case, and should be overruled.

The second ground for holding that the construction of the camp was itself "production of goods for commerce" is that the camp was to be an instrumentality of commerce. By definition, a staging area, since it is a place for the collection, organization and preparation of troops for shipment, is an instrumentality of commerce—just as much, say, as a railroad yard where trains are assembled. A staging area remains stationary, but so does a section of railroad track, and both are instrumentalities of commerce. The entire project constituted the forging of another link in a chain of commerce, transportation and activity which was not merely interstate but world-wide.

Three Circuit Courts of Appeals have held that "production of goods for commerce" means production of goods *to facilitate commerce* even though these goods may not themselves move across State lines. *Hamlet Ice Co.* v. *Fleming,* 127 F. (2d) 165 (4th Circ., 1942), cert. den. 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (6th Circ.), cert. den. 320 U. S. 761; *Atlantic Co.* v. *Walling,*

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* *Anderson* v. *Federal Cartridge Corporation,* 62 F. Supp. 775 (D. Minn.); *Brue* v. *Steers,* 60 F. Supp. 668 (S. D. N. Y.); *Damon* v. *Ford, Bacon, Davis, Inc.,* 62 F. Supp. 446 (E. D. Pa.); *Dollar* v. *Caddo River Lumber Co.,* 43 F. Supp. 822 (D. Ark.); *Noonan* v. *Fruco Construction Co.,* 140 F. (2d) 633 (C. C. A. 8th); *Scott* v. *Ford, Bacon & Davis,* 55 F. Supp. 982 (E. D. Pa.); *Wells* v. *Ford, Bacon & Davis,* 7 Labor Cases, par. 61,929 (W. D. Ky.), aff'd 145 F. (2d) 240 (C. C. A. 6th).

131 F. (2d) 518 (5th Circ., 1942). The Wage and Hour Administrator has adopted this view (Release A-14, March 13, 1945, appearing in CCH Labor Service, par. 33,076). The Administrator has accordingly ruled that the production of such items as railroad ties and telephone poles for use within the same State should be regarded as covered. It would seem to follow *a fortiori* that construction of a new siding or station, or of a staging area, would be covered.

This Court has not yet passed on this point, which is of wide significance, and should do so.

CONCLUSION

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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APPENDIX A

Pertinent provisions of the Fair Labor Standards Act of 1938

29 U. S. C. Section 201 et seq.

§ 202. *Congressional Finding and Declaration of Policy.*

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. *Definitions.*

As used in sections 201-219 of this title—

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

§ 207. *Maximum Hours.*

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * *

(3) For a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 255

SOL COHEN, ET AL., PETITIONERS

v.

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York (R. 129–130) is reported at 185 Misc. 389. The opinion of the Appellate Division of the Supreme Court of the State of New York (R. 145–146) is reported at 270 App. Div. 478. The judgment of the Appellate Division was affirmed by the Court of Appeals of the State of New York without opinion. 296 N. Y. 776.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on January 9,

1947 (R. 148–149). A motion for reargument, made on April 23, 1947, was denied on May 22, 1947 (R. 149). The petition for a writ of certiorari was filed on August 11, 1947. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether petitioners, employed solely as timekeepers or cost clerks by a contractor engaged in the construction, wholly in New York, of a new army encampment, under cost-plus contract with the United States, were "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, are set forth in the Appendix, *infra*, p. 13.

STATEMENT

At all times material to this suit respondents, as joint-venturers, were engaged in the construction of new buildings, barracks and other facilities for an army camp located at Orangeburg, New York, and in the "rehabilitation of a dock" located at Piermont, New York, four miles from

the camp project (R. 55–56, 65–67, 111–112, 129).[1] Petitioners were employed at the camp project as cost clerks or timekeepers (R. 48, 67–68, 86–87, 129). They were paid at a straight hourly rate for a work-week of 48 hours, and were listed as administrative and non-manual personnel (R. 124–127, 129).

The duties performed by the timekeepers[2] consisted of checking the manual laborers and mechanics[3] "in" on the job in the mornings and checking them "out" in the evenings (R. 49–50, 53–54), performing "field checks" in order to determine whether or not the men were working on their assigned jobs (R. 51, 53), tabulating the results of their several field checks, and preparing records concerning the number of hours worked

[1] Respondents entered into a "cost-plus" contract with the War Department for the construction of this project, a staging area later known as Camp Shanks (R. 74, 129). Pursuant to this contract, the United States is, or may be, obligated to reimburse the contractors for money paid in resisting or settling claims arising out of work performed thereunder. Defense of this action was undertaken by the Department of Justice at the request of the War Department.

[2] Three petitioners were cost clerks and 113 were timekeepers (R. 70, 86–87).

[3] The men whose time they kept were "laborers, labor foremen, skilled mechanics such as plumbers, electricians, machine men, mechanics on the machines, bulldozer drivers, tractor drivers, oilers, wipers, office help in some of the shacks, cement men, plasterers, helpers to these various mechanics" (R. 54).

by each of these personnel (R. 49–50, 52, 54).[4] The work of the laborers and mechanics whose time they checked involved clearing and grading the camp site, laying foundations, erecting barracks and other buildings, constructing roads and other transportation facilities, installing electrical equipment and "rehabilitating" the Piermont dock (R. 55, 65, 67, 74–76, 84–86, 105–106).

The duties of the cost clerks were separate and distinct from those of the timekeepers, and consisted of preparing cost cards for the use of respondents' cost and progress department (R. 68–72). The cost records kept by these cost clerks pertained to the work of plumbers, carpenters, brick layers, and cement workers (R. 72–73).

The record discloses that petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in new and original work within the camp project (R. 54–55, 72–73). Although certain of the materials used in the camp construction were purchased from out of state sources (R. 76–80), petitioners neither handled nor checked such materials (R. 65, 81), nor did they keep the time records, or pay roll records, of the material checkers (R. 54, 65–66).

On the above facts,[5] the Supreme Court of New

[4] The timekeepers occasionally performed "special assignments" such as delivering emergency orders and messages to the men in the field (R. 52).

[5] Findings of fact by the trial judge were waived by stipulation of the parties (R. 47, 36a).

York gave judgment in favor of respondents in the suit, instituted by petitioners in that court under the Fair Labor Standards Act to obtain statutory overtime, liquidated damages, and counsel fees. Relying on *McLeod* v. *Threlkeld*, 319 U. S. 491, and similar decisions, the trial judge held that petitioners had not established that they were "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the statute (R. 129–130). This judgment was affirmed by the Appellate Division and by the Court of Appeals (R. 139–143, 150–151).

ARGUMENT

1. Petitioners seek to bring this case within the ambit of *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, by reference to a purported record-keeping requirement imposed on them by the New York courts and utilized as the means of defeating their claims (Pet. 7–12). The "crucial" question thus posed assumes an employer "* * * whose operations are both interstate and intrastate in character * * *", who fails to segregate the two activities, and whose employees, i. e., petitioners, perform work in connection with both (Pet. 7). No such question is involved herein. The New York courts plainly held that petitioners, timekeepers and cost clerks on local new construction work were not within the coverage of the Act (R. 129–130, 146). In so

holding, they invoked no novel doctrine and we submit that their judgments are correct.

This Court has stated that the problem presented by any coverage case under the Fair Labor Standards Act is one of "drawing lines". *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523. Insofar as the needs of this case are concerned, the line has been sufficiently drawn. The record clearly shows, as recognized by the courts below, that respondents were engaged in new and original construction at Camp Shanks (R. 54–55, 72–73, 129, 146). It has been uniformly held that employees on such work are not "* * * engaged in commerce or in the production of goods for commerce * * *" within the meaning of the statute.[6] The result thus consistently reached by the lower federal courts is identical with the official interpretation of the Act by the Administrator of the Wage and Hour Division in connection with the same question of coverage. Interpretative Bulletin No. 5, Paragraph 12 (1944–1945 Wage and Hour Manual 23), Appendix, *infra,* p. 13. The Administrator's view, an important

[6] *Barbe* v. *Cummins Const. Corp.*, 135 F. 2d 667 (C. C. A. 4); *Noonan* v. *Fruco Const. Co.*, 140 F. 2d 633 (C. C. A. 8); *Parham* v. *Austin Co.*, 158 F. 2d 566 (C. C. A. 5); *Nieves* v. *Standard Dredging Corp.*, 152 F. 2d 719 (C. C. A. 1); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 F. Supp. 982 (E. D. Pa.); *Collins* v. *Ford, Bacon & Davis, Inc.*, 66 F. Supp. 424 (E. D. Pa.); *Wells et al.* v. *Ford, Bacon & Davis*, 7 Labor Cases, Par. 31, 929 (W. D. Ky.), aff'd. without opinion, 145 F. 2d 240 (C. C. A. 6); *Damon* v. *Ford, Bacon & Davis*, 62 F. Supp. 446 (E. D. Pa.).

guide in construing the statute (*Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 183), is particularly pertinent here since he has specifically referred to army barracks as illustrative of the type of new construction not within the statute. 1944–1945 Wage and Hour Manual 32–33, Appendix, *infra*, p. 15.

Petitioners seek to avoid the above described rulings on new construction employee coverage by copious reference to interstate movements of materials for respondents' work at Camp Shanks and to the linking of the camp to transportation and communication facilities (Pet. 8). Concededly, the Wage and Hour Administrator has stated that particular employees of new construction contractors, such as those "* * * engaged in transporting goods, machinery, or materials across state lines * * *" may come within the Act. Appendix, *infra*, p. 16. This, however, is not an exception from which petitioners can derive any comfort since they have never shown themselves to be in any way connected with possible interstate activities of respondents. Cf. *Englert* v. *S. Birch & Sons Construction Co.*, decided June 27, 1947 (C. C. A. 9), and cases cited therein. On the contrary, the record clearly shows, as we have stated, *supra*, p. 4, that petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in the new and

original construction involved in the camp project.[7] They had no connection with the interstate movement of materials nor with the men handling such interstate movements. We submit that the New York courts correctly discounted petitioners' random references to interstate movements of materials and connections with transportation facilities, and held that petitioners' employment related solely to the local construction project.

Petitioners advance, if they be held not to have been "* * * engaged in commerce * * *", an alternative argument to bring themselves within the statute, namely, that the construction of Camp Shanks fell within the category of "* * * production of goods for commerce * * *" (Pet. 4, 12–14). No such distinction in statutory categories of coverage can validly be made herein. New construction employees, such as petitioners, are neither engaged in commerce nor in the production of goods for commerce. Interpretative Bulletin No. 5, Paragraph 12, Appen-

[7] The status of new and original construction employees is not involved in the cases as to which petitioners assert a conflict (Pet. 4, 11–12). *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178; *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680; *Guess* v. *Montague*, 140 F. 2d 500 (C. C. A. 4); and *Skidmore* v. *Casale*, 160 F. 2d 527 (C. C. A. 2). These cases involve at most repair or construction work in connection with existing interstate activities, a type of situation clearly distinguished by the Wage and Hour Administrator from the new construction situation presented herein. Appendix, *infra*, pp. 14–18.

dix, *infra*, p. 13; see cases cited in fn. 6, *supra*, p. 6. This rule clearly covers petitioners' status in connection with the construction of Camp Shanks itself. Nor is their status changed by suggestions that the construction of Camp Shanks was "necessary" to the production of goods for commerce (Pet. 12–14). We do not believe it necessary, in connection with this contention, to examine the distance between petitioners' duties, narrow in scope and terminated with the completion of the construction project, and the subsequent use of the camp by the Army. *10 East 40th St. Co.* v. *Callus*, 325 U. S. 578, 582; *Wilson* v. *Reconstruction Finance Corp.*, No. 1062, Oct. Term, 1946, Br. in Opp., pp. 7–8. For it is apparent that Army utilization of the completed camp as a staging or embarkation area for troops was not the production of goods for commerce.

2. We suggest that the petition for certiorari herein was not seasonably filed. The judgment of the Court of Appeals was entered on January 9, 1947 (R. 148).[8] This judgment was final. *Department of Banking* v. *Pink*, 317 U. S. 264. The three-month period within which petitioners could apply to this Court for certiorari, accordingly, began to run on January 9, 1947, and expired on April 9, 1947. 28 U. S. C. 350. Petitioners took

[8] The remittitur was dated January 10, 1947, and judgment was entered thereon in the Supreme Court on January 20, 1947 (R. 148, 151–152).

no steps to toll or suspend the running of the three-month period prior to its expiration on April 9, 1947. *Department of Banking* v. *Pink*, 317 U. S. at 266; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. It is thus clear that petitioners had lost their right to apply for certiorari after April 9, 1947 unless the right was revived by their subsequent motion. Cf. *Matton Co.* v. *Murphy*, 319 U. S. 412, 415; *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261.

On April 23, 1947, after the period for filing a petition for certiorari had expired, petitioners served notice upon the United States Attorney that they were going to request the Court of Appeals to recall the remittitur and to issue an order granting to petitioners leave to reargue.[9] In ac-

[9] The dates on which this motion was noticed and made are shown in the Department's files. They are not contained in the record nor set forth in the petition. For the convenience of the Court, the body of the "Notice of Motion for Reargument" is here set forth:

Sir:

PLEASE TAKE NOTICE that upon the record and all the proceedings heretofore had in this case, and upon the order of this Court dated January 9, 1947, affirming the judgment herein of the Appellate Division which affirmed the judgment for defendants herein entered by the Supreme Court, Bronx County, the undersigned will move this Court at the Court of Appeals Hall, Albany, New York on May 12, 1947, at 2 o'clock in the afternoon for a recall of the remittitur and for an order granting to plaintiffs-appellants leave to reargue the decision of this Court affirming without opinion the judgment herein of the Appellate

cordance with Rule XX of the Rules of the Court of Appeals, the motion was submitted without oral argument.[10] The motion for leave to reargue was denied on May 22, 1947 (R. 149). In these circumstances, it is clear that the Court of Appeals did not "entertain" petitioners' motion for leave to reargue (*Fosdick* v. *Town of Hempstead,* 126 N. Y. 651) and that the finality of that court's judgment of January 9, 1947, was never suspended. *Department of Banking* v. *Pink,* 317 U. S. at 266; *Pfister* v. *Finance Corp.,* 317 U. S 144, 149–150; *Bowman* v. *Loperena,* 311 U. S. 262, 266; *Gypsy Oil Co.* v. *Escoe, supra; Morse* v. *United States,* 270 U. S. 151. Accordingly, we submit that the petition herein was not seasonably filed and should be dismissed for want of jurisdiction.

Division and for such other and further relief as to the Court may seem proper.

Dated, New York, April 23, 1947.

Yours, etc.,

* * * * *

[10] Rule XX of the Rules of the Court of Appeals provides:

Motions for reargument.

Motions for reargument must be submitted on printed briefs (eighteen copies) without oral argument, on five days' notice to the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon. A copy of the brief shall be served on the adverse party with the notice of motion.

CONCLUSION

For the reasons set forth above, the petition for certiorari herein should be denied or dismissed.

Respectfully submitted.

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Attorneys.

SEPTEMBER 1947.

APPENDIX

1. The Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C. 201, *et seq.*) provides in part:

> SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. Paragraph 12 of Interpretative Bulletin No. 5 provides:

> The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act.

3. 1944–1945 Wage and Hour Manual, pp. 32–33 provides:

> Application to Individual Industries—Building and Construction
>
> *Statement by Wage and Hour Division summarizing rulings on construction operations*
>
> Key to the Division's position lies in the fact that it regards the reconstruction, maintenance or repair of buildings used to produce goods sold across state lines as work necessary to the production of goods for commerce within the meaning of the Act. New construction, however, is usually not considered subject to the law unless the construction is "an integral part of the production of a specific type of goods for commerce."
>
> The distinction between original construction and reconstruction, together with the exceptions made by the Division to its general ruling, is explained, with clarifying examples, in the opinion which follows in full:
>
> APPLICABILITY OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF BUILDING AND CONSTRUCTION CONTRACTORS
>
> The opinions of the Wage and Hour Division regarding the applicability of the Fair Labor Standards Act to employees of building and construction contractors are set forth in paragraphs 12 and 13 of Interpretative Bulletin No. 5. Because of a number of requests for information which we have received in recent months regarding the applicability of the Act to the types of employees described therein we feel it advisable to clarify the principles stated in

these paragraphs in their applicability to certain situations which have been called to our attention.

1. THE GENERAL CONSTRUCTION OF BUILDINGS

A. General

It is stated in paragraph 12 of Interpretative Bulletin No. 5 that "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the act."

B. Typical examples of no coverage

Typical cases of original construction of building in which it is the opinion of the Wage and Hour Division that the Fair Labor Standards Act, has no application are those of employees engaged in the original construction of homes, apartments, churches, schools and army barracks. Moreover, it is the Division's opinion, as pointed out in paragraph 12, that generally employees engaged in the original construction of buildings are not within the coverage of the Act even though the buildings when completed will be used to produce goods for commerce.

C. Contractor working in more than one state

The mere fact that a construction contractor performs construction work in several states would not affect the status of his employees under the Act if such employee would not otherwise be within its coverage. A typical case would be one in which a construction contractor maintained his principal office in state A and contracted to erect homes and apartment houses in states B and C. Unless the employees engaged in construction in states B and C were engaged in transporting goods, machinery, or materials across state lines, or in other forms of interstate commerce, their employment would not be subject to the Act.

D. Situations involving original construction where such construction is an integral factor in the production of goods for commerce and intimately related thereto

While it is stated in paragraph 12 of Interpretative Bulletin No. 5 that employees engaged in the original construction of buildings are not generally within the scope of the Act, it should not be inferred from this statement that no employees engaged in the original construction of any structure would fall within the coverage of the Act. In the opinion of the Division, employees engaged in the original construction of structures, where such construction must practically be viewed as an integral part of the production of a specific type of goods for commerce, are covered by the Act.

Thus, for example, employees engaged in the original construction of oil derricks and in related construction activities are en-

gaged in processes or occupations necessary to the production of goods within the meaning of Section 3 (j) of the Act. An oil derrick is erected solely to the end of conducting the subsequent drilling operations as a direct result of which the oil is to be produced. When it is considered that such a derrick, when once erected, cannot conceivably serve any other productive purpose, it becomes apparent that the construction thereof is properly to be regarded as an integral step in the actual drilling operations. It is distinguishable from the construction of a factory building which is intended to produce specific types of commodities. The utility of such a factory building is not limited to the production of the commodity originally contemplated. There are numerous instances in which, because of economic factors, such as fluctuations in the demands for various factory products, plants have been remodeled, new machinery installed, and commodities entirely different from those originally contemplated have been produced. This obvious distinction urges us to the conclusion that employees who construct an oil derrick should be viewed as engaged in the process of production, but that employees who construct a building in which goods for commerce are to be produced should be regarded as a step removed from actual productive operations. For the same reason as is applicable to oil derrick construction, such operations as clearing land, digging pits, and building certain earthen fire walls, in connection with oil drilling operations are properly to be regarded as within the general coverage of the Act.

The application of the general principle expressed above is limited to the original construction of oil derricks and related construction activities. The situation in which an oil derrick is constructed has been discussed merely to illustrate the operation of the general principle within which it falls.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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Respondents' Discussion of the Merits

It was the carefully substantiated claim of petitioners in their main brief that the record in this case presents the following question:

> "Where an employer whose operations are both interstate and intrastate in character does not in any way segregate the two or distinguish between them, and where some of his employees regularly perform work which is essential to both types of operations, must each employee prove what proportion of his time was allocable to the interstate phase [in order to secure the protection of the Fair Labor Standards Act]?"

Respondents do not attempt to answer this question in the affirmative. Nor do they attempt to deny that the question is one which this Court should decide. They simply deny that the question is presented.

Respondents support this position by stating that "petitioners * * * have never shown themselves to be in any way connected with possible interstate activities" and that "petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in the new and original construction involved in the camp project" (Respondents' Brief, pp. 7-8). These statements are simply incorrect. The record shows indisputably that the petitioners checked the time of *all* of defendants' employees, including those who were engaged in interstate activity as well as those who were not (Petition and Brief, pp. 2, 9).

Timeliness of the Petition

Respondents have suggested that the petition herein was not timely filed.

In the case of *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498, this Court said (pp. 498-499):

> "The running of the time within which proceedings may be initiated here to bring up a judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition * * *."

Again in *Department of Banking* v. *Pink,* 317 U. S. 264, a case which arose in the State of New York, the Court said (p. 266):

> "A timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified * * *".

Obviously the words "seasonable" and "timely" in the above passages refer to the practice of the state court, and have no reference to the three-month period determining the jurisdiction of this Court. Respondents cannot and do not contend that petitioners' motion for reargument in the Court of Appeals was not "seasonable" or "timely" under the rules of that Court. Yet respondents maintain that because the motion for reargument was not made within three months of the original judgment of January 9, 1947, petitioners lost their right to file a petition for certiorari. Clearly this would not be true if the Court of Appeals had ordered reargument and then reaffirmed its original judgment. But respondents argue that, because the Court of Appeals denied the petitioners' motion for reargument, the finality of its earlier judgment was not suspended.

A timely motion for rehearing either suspends the finality of the original judgment, or it does not. Its effect in that respect cannot vary depending on whether or not it was made within three months of the judgment. Yet that is what respondents must contend.

Presumably no question of timeliness could or would have been raised here if the motion for reargument in this case had been made before April 9, 1947, even though the motion had eventually been denied. That would have been so because the motion had operated to "suspend the finality of the state court's judgment" (*Department of Banking* v. *Pink, supra*). We do not understand how respondents can now contend that because the motion was made later, but still "seasonably", it had a lesser effect upon the finality of the original judgment.

Respondents state that, in the circumstances of this case, "it is clear that the Court of Appeals did not 'entertain' petitioners' motion for leave to reargue". How is this "clear"? Do respondents contend that the Court of Appeals dealt differently with the motion because it was made more than three months after the original decision?

It will be noted that the Court of Appeals did not "dismiss" the motion for reargument, but "denied" it after "due deliberation" (R. 149). This was done in spite of the fact that the United States Attorney in his brief to the Court of Appeals opposing the motion for reargument asked that the motion "be dismissed rather than denied so that appellants will be precluded from reviving their time to file a petition for certiorari".

While we do not believe the grounds of the motion for reargument are pertinent here, it may be of interest that the motion was not a purely formal one. The basis for the motion was the fact that, since the original decision of the Court of Appeals, the Circuit Court of Appeals for the Second Circuit had decided the case of *Skidmore* v. *Casale,* 160 F. (2d) 527, which was directly in conflict with it (see our Main Brief, pp. 11-12). Detailed briefs were submitted, dealing primarily with the issues of the applicability of that case to the instant situation.

None of the cases cited by respondents for the proposition that the motion for reargument did not suspend the finality of the original judgment are applicable to the instant situation. In *Department of Banking* v. *Pink,* 317 U. S. 264, a motion to amend the remittitur had been made, and this Court sharply distinguished it from a motion for reargument in the language quoted above (p. 2). In *Pfister* v. *Finance Corp.,* 317 U. S. 144, and *Bowman* v. *Loperena,* 311 U. S. 262, both of which arose out of bankruptcy proceedings, the petitions for rehearing had been filed out of time; and this Court held it to be a controlling circumstance whether or not the petition for rehearing was granted. In *Gypsy Oil Co.* v. *Escoe, supra,* and *Morse* v. *U. S.,* 270 U. S. 151, the Court was dealing with motions for leave to file a motion for rehearing. Needless to say, the motion for reargument in the present case was not a motion for leave to file a motion for reargument. If the Court of Appeals had looked favorably upon the motion for reargument, it would have proceeded forthwith to order a

new oral argument. The fact that it did not do so, but denied the motion for reargument, does not mean that it did not consider the motion on its merits.

Surely it is not the intent of this Court by its rulings to interfere with the jurisdiction and practice of the several state courts. Yet by a holding that the present petition was not timely, this Court would in effect be imposing upon the States a three-month time limit for the filing of motions for reargument. Obviously no litigant would take advantage of a longer period if, by so doing, he would be losing the opportunity to file a petition for certiorari.

Respectfully submitted,

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